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11 UNITED STATES DISTRICT COURT  
12 FOR THE EASTERN DISTRICT OF WASHINGTON  
13

14 JEREMY OLSEN,

15 Plaintiff,

16 v.

17 XAVIER BECERRA, in his official  
18 capacity as Secretary of the United States  
19 Department of Health and Human  
20 Services,

21 Defendant.

No. 2:21-CV-00326-SMJ

JOINT RULE 26(f) REPORT

22 Pursuant to Rule 26(f) and the scheduling conference notice dated May 13,  
23 2022 (ECF No. 43), the parties, through their respective counsel, submit the following  
24 joint report.  
25

26 **A. Consent to Magistrate Judge**

27 The parties do not consent to the case being heard by a magistrate judge. Both  
28 parties have returned the “Consent to Magistrate Judge” form to the Clerk’s Office.

**B. Jurisdiction and Venue**

Jurisdiction exists under 42 U.S.C. §§ 405(g) and 1395ff. Venue is proper

1 under 28 U.S.C. § 1391(c)(1).

2 **C. Service of Process**

3 Service of process is complete.

4 **D. Brief Description of Claims and Defenses**

5 **1. Plaintiff's Summary**

6 As in the prior case, the Secretary has repeatedly denied Mr. Olsen's CGM  
7  
8 claims on the bad faith grounds that a CGM is not "durable medical equipment" as set  
9 forth in the illegally issued CMS 1682-R. Incredibly, after this Court's bad faith  
10 finding in *Olsen I*, the Secretary continued denying Mr. Olsen's claims on the same  
11 bad faith grounds.  
12

13  
14 Upon receiving his latest denials, Mr. Olsen attempted to utilize the "expedited  
15 access to judicial review" procedure provided by the statute. 42 U.S.C. §  
16 1395ff(b)(2). Where the grounds for denial of a claim are grounds that neither an ALJ  
17 nor the MAC have authority to decide, that procedure directs that a party should go  
18 straight to district court. Given that Mr. Olsen's claims were denied solely on the  
19 basis of the illegally issued CMS 1682-R and that neither an ALJ nor the MAC have  
20 the authority to decide the illegality of CMS 1682-R, Mr. Olsen requested expedited  
21 access to judicial review.  
22  
23

24  
25 Mr. Olsen's invocation of this procedure apparently got attention, with the  
26 Department realizing that they were within three weeks of being sued again. Thus, in  
27 October 2021, the Department sent a notice stating that they were paying all of Mr.  
28

1 Olsen's claims over a considerable period of time. This was part of an admitted effort  
2 to pay only the claims of people who litigated the issue of CGM coverage to a district  
3 court while continuing to deny everyone else's on the bad faith grounds. Thereafter,  
4 Mr. Olsen's request for expedited access was denied on the ground that, while his  
5 claim was only rejected based on the illegal CMS 1682-R, some other grounds might  
6 be used to deny his claim. Within days, an ALJ considering the same claim denied it  
7 saying he was bound by CMS 1682-R.  
8  
9

10 The simultaneous payment and denial of MR. Olsen's claims subjected him to  
11 recoupment by the Secretary. This suit was brought to extinguish that right of  
12 recoupment, to obtain a decision that CMS 1682-R issued illegally and an injunction  
13 barring its enforcement, and (because the ALJs within the Department are not neutral  
14 decision makers) to appoint a special master to oversee CGM claim processing.  
15  
16

17 In response to the filing of this suit, the Secretary has taken a number of steps to  
18 avoid/delay a judicial finding that CMS 1682-R issued illegally and preserved his  
19 ability to act illegally without censure from the Courts.. First, shortly after this suit  
20 was filed, the Secretary had an epiphany and decided that CGMs were in fact "durable  
21 medical equipment." However, the Secretary sought to lock in the fruits of his  
22 misconduct by limiting coverage to claims with dates of service after February 28,  
23 2022.  
24  
25

26 Second, the Secretary intentionally failed to serve the administrative record in  
27 this case, thereby preventing Mr. Olsen from moving for summary judgment. Instead,  
28

1 the Secretary's misconduct forced Mr. Olsen to seek a preliminary injunction and  
2 delayed resolution on the merits. When Olsen filed a motion for a preliminary  
3 injunction pointing out that, by the Secretary's own admission, the illegal policy of  
4 CMS 1682-R would remain in effect for a year (and that tens of thousands of claims  
5 would be denied on that basis), the Secretary responded on February 25, 2022, with  
6 the "Technical Direction Letter." This document has no statutory or regulatory basis  
7 and was just a letter the Secretary sent to some of the claim processing entities telling  
8 them to ignore the binding CMS 1682-R and follow the letter. The Secretary then told  
9 this Court that, based on the TDL, claims with dates of service prior to March 1, 2022,  
10 would be covered and that this case was moot.  
11  
12

13  
14 Mr. Olsen then pointed out that the letter both demonstrated the lawlessness  
15 with which the Department operates and, because of its limited nature, also meant that  
16 ~4,000 claims/month would still be denied on the illegal grounds.  
17

18 This Court subsequently denied Olsen's request for a preliminary injunction.  
19 The Court held that the case was not moot, in part because the Court had little faith  
20 that the Secretary would do whatever he says now. This Court also called the  
21 Secretary's conduct "shocking." However, because Olsen's claims had been paid, the  
22 Court held that Olsen was not facing irreparable harm.<sup>1</sup>  
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25 <sup>1</sup> Respectfully, Olsen's claims have been paid because he has counsel and, as the  
26 Secretary admits, he takes special steps to make sure that the claims of people who  
27 litigate are paid, so that he can continue to deny everyone else's claims on the bad  
28 faith grounds. There is no CGM Santa Claus and tens of thousands of people have  
been unable to secure a CGM as a result of the Secretary's misconduct. Unable to

1 Simultaneously, another case out of Utah was working its way to the Tenth  
2 Circuit with oral argument scheduled for May 17, 2022. There, the Secretary made  
3 the same arguments he made here regarding mootness and the TDL. On May 13,  
4 2022, (i.e., the Friday before Tuesday oral argument), the Secretary issued CMS 1738,  
5 purporting to rescind CMS 1682). Thereafter, at oral argument, the Secretary  
6 conceded that claims would have been continued to be denied based on CMS 1682  
7 even assuming that the ALJs violated the law and followed the TDL. For the first  
8 time in that case, the Secretary argued mootness and supplemental briefing on that  
9 issue was filed on June 1, 2022.  
10  
11

12  
13 Simultaneously in this case, the Secretary has begrudgingly filed a series of  
14 Amended Answers with increasing admissions. Now that that process is complete, all  
15 that remains is to address the merits of Olsen's claims and requested relief on  
16 summary judgment.  
17

18 Apparently applying the maxims that "the best defense is a good offense"  
19 and/or "there is no hole so deep it cannot be made deeper", the Secretary has a new  
20 theory that Mr. Olsen somehow has behaved improperly by appealing and litigating  
21 his claims that were denied in bad faith. During the Rule 26(f) conference held on  
22 June 1, 2022, the Secretary's representatives stated their intention to pursue a fraud on  
23 the Court theory. Respectfully, Mr. Olsen hopes that cooler heads will prevail on this  
24  
25

26  
27 secure a CGM those people suffered the severe events that a CGM is designed to  
28 prevent. As a result, each of those persons suffered irreparable harm and some  
number died.

1 matter and encourages the Secretary to read the Complaint. To be clear, any such  
2 charge is baseless.

3       2. Defendant's Summary  
4

5       There are two Medicare reimbursement claims at issue in this lawsuit: (1) a  
6 claim for continuous glucose monitor ("CGM") sensors with date of service April 19  
7 – July 18, 2019 (the "April 2019 claim"), and (2) a claim for CGM sensors with date  
8 of service March 10, 2021 (the "March 2021 claim").  
9

10       Both claims were paid in July 2021, four months before the case was filed.  
11 The claims were paid by the Secretary's Medicare Administrative Contractor,  
12 Noridian Healthcare Solutions ("Noridian"), pursuant to this Court's judgment in  
13 *Olsen v. Becerra*, Case No. 20-CV-00374-SMJ ("*Olsen I*").  
14

15       The entities that issued the challenged administrative decisions (the Medicare  
16 Appeals Council as to the April 2019 claim, and the ALJ as to the March 2021 claim),  
17 were not aware of the *Olsen I* judgment, or the fact that Noridian had previously paid  
18 the underlying claims pursuant to that judgment. As a result, those entities issued  
19 decisions purporting to deny coverage for the claims pursuant to CMS 1682-R, even  
20 though the claims had already been paid. Below is a summary of when the claims  
21 were paid in relation to the challenged administrative decisions:  
22  
23  
24

<b>April 19 - July 18, 2019 Claim</b>	<b>Date</b>
Initial Denial by Noridian (MAC)	6/14/2019
Redetermination Request (MAC)	7/5/2019
Redetermination Decision (MAC)	7/25/2019

Reconsideration Request (QIC)	10/7/2019
Reconsideration Decision (QIC)	11/26/2019
ALJ Hearing Request	12/3/2019
ALJ Hearing	1/8/2020
ALJ Decision	1/31/2020
Appeal to Medicare Appeals Council	2/11/2020
<i>Olsen I</i> Judgment	2/23/2021
<i>Olsen I</i> Bad Faith Ruling	4/20/2021
CLAIM PAID	7/15/2021
<b>Medicare Appeals Council Decision (Challenged Decision)</b>	<b>10/22/2021</b>

<b>March 10, 2021 Claim</b>	<b>Date</b>
<i>Olsen I</i> Judgment	2/23/2021
Initial Denial by Noridian (MAC)	4/16/2021
<i>Olsen I</i> Bad Faith Ruling	4/20/2021
Redetermination Request (MAC)	5/3/2021
Redetermination Decision (MAC)	6/16/2021
Reconsideration Request (QIC)	6/30/2021
CLAIM PAID	7/15/2021
Reconsideration Decision (QIC)	8/24/2021
ALJ Hearing Request	9/7/2021
ALJ Hearing	10/8/2021
<b>ALJ Decision (Challenged Decision)</b>	<b>10/26/2021</b>
Appeal to Medicare Appeals Council	none
Medicare Appeals Council Decision	none

Defendant concedes that the administrative decisions purporting to deny coverage should be vacated because: (1) the underlying claims were previously paid, rendering the decisions moot; and (2) Plaintiff is independently entitled to coverage pursuant to the *Olsen I* judgment. Defendant also admits that Plaintiff is entitled to an

1 award of attorney's fees and costs incurred in securing the vacation of those decisions.

2 To the extent Plaintiff is seeking additional relief, his claims are moot and/or  
3 fail as a matter of law. The Secretary has completed notice and comment rulemaking  
4 which confirms that disposable sensors that work with an insulin pump like the device  
5 Plaintiff uses are covered as "durable medical equipment" under Medicare Part B. *See*  
6 86 Fed. Reg. 73860, 73896-902, (Dec. 28, 2021) ("DME Final Rule"). The DME  
7 Final Rule replaced CMS 1682-R on a prospective basis effective February 28, 2022.  
8 The DME Final Rule effectively ensures that future claims submitted by Plaintiff and  
9 other similarly-situated Medicare claimants will be covered. The Secretary has also  
10 formally rescinded CMS 1682-R. The rescission of CMS 1682-R effectively ensures  
11 that past claims submitted by Plaintiff and other similarly-situated claimants will be  
12 covered, provided that the claims had not expired or been administratively exhausted  
13 as of February 28, 2022. *See* CMS 1738-R, ECF No. 44-1, at 1-2 ("[F]or CGMs  
14 furnished before February 28, 2022, this Ruling provides that the substantive CGM  
15 classification, coverage, and payment policies established by the [DME Final Rule]  
16 shall be applied to claims for a CGM monitor or receiver and/or its necessary supplies  
17 and accessories where either: (1) a valid CGM claim or valid CGM appeal was  
18 pending as of February 28, 2022; or (2) the right to submit a valid CGM claim or file a  
19 valid CGM appeal had not expired as of February 28, 2022."). Taken together, the  
20 DME Final Rule and the rescission of CMS 1682-R moot any claim for relief beyond  
21 an administrative remand of the challenged agency decisions.  
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1 In his Complaint and preliminary injunction briefing, Plaintiff conspicuously  
2 failed to disclose that the April 2019 and March 2021 claims were paid in July 2021,  
3 months before the case was filed. Until recently, Defendant gave Plaintiff the benefit  
4 of the doubt on this issue, assuming that Plaintiff, like the ALJ and Medicare Appeals  
5 Council, did not know that these claims had been paid months earlier.  
6

7 Last week, however, Defendant learned that Plaintiff almost certainly *did* know  
8 that these claims had been paid months earlier. In particular, Defendant was advised  
9 by the group that manages the Medicare.gov website that Plaintiff performed a claim  
10 status search at 7:26 p.m. on November 9, 2021, nine days before the Complaint was  
11 filed. The search parameters were as follows:  
12

13  
14 Type: Durable Medical Equipment

15 Range: All Claims History

16 Date: Past 36 Months  
17

18 Defendant is advised that the results of this search showed that the March 2021  
19 claim was paid in July 2021. Defendant is currently in the process of confirming that  
20 the same is true for the April 2019 claim. Defendant is also attempting to identify the  
21 IP address from which this search was performed.  
22

23 The fact that Plaintiff (or his counsel) performed this search before filing the  
24 Complaint changes the complexion of this case, and may warrant additional motion  
25 practice before the case proceeds to summary judgment. Defendant's purpose in  
26 raising this issue is not to "go on offense" or "pursue a fraud on the Court theory" as  
27  
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1 Plaintiff suggests above. Plaintiff has repeatedly and vociferously accused Defendant  
2 and his counsel of acting in bad faith. Defendant's purpose in raising this issue is to  
3 rebut those claims by placing them in their appropriate factual and historical context.  
4 If Plaintiff knew his claims had been fully paid in July 2021, there would have been  
5 no reason for him to continue to pursue administrative appeals or to file this lawsuit.  
6 Nor would there have been a good-faith basis for alleging that Defendant "denied" his  
7 fully-paid claims in defiance of the *Olsen I* judgment.  
8  
9

#### 10 **E. Constitutionality of Statute**

11 The constitutionality of a statute is not being challenged.  
12

#### 13 **F. Class Action**

14 This case is not being pursued as a putative class action.  
15

#### 16 **G. Certification of Issues to State Supreme Court**

17 There are no issues that need to be certified to a state supreme court.  
18

#### 19 **H. Deadline for Amending Pleadings**

20 The parties propose a deadline of July 15, 2022, to amend pleadings.  
21

#### 22 **I. Deadline for Adding Parties**

23 The parties propose a deadline of July 15, 2022, to add parties.  
24

#### 25 **J. Corporate Disclosure Statement**

26 No party is required to file a corporate disclosure statement.  
27

#### 28 **K. Guardian Ad Litem**

Appointment of a guardian ad litem is not necessary because neither party is a

1 minor or an incompetent party.

2 **L. Discovery**

3 1. Plaintiff's Position

4 Mr. Olsen does not believe that discovery is needed/permissible.

5 2. Defendant's Position

6 Because this is a record review case, discovery is generally not permitted.

7  
8 However, Defendant intends to request leave to take limited discovery to establish the  
9 date on which Plaintiff became aware that the April 2019 and March 2021 claims had  
10 been paid in July 2021. Defendant has reason to believe that the supplier of Plaintiff's  
11 CGM sensors, Minimed Distribution Corp., ("Minimed") told Plaintiff that it received  
12 payment for both claims shortly after the payments were issued, and intends to seek  
13 production of communications to that effect, in addition to other relevant documents  
14 in Plaintiff's or Minimed's possession.  
15  
16  
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18 **M. Protective Orders & Confidentiality Agreements**

19 The parties do not anticipate entering into a confidentiality agreement or  
20 requesting entry of a protective order at this time.  
21

22 **N. Anticipated Motions and Dispositive Motion Deadlines**

23 1. Plaintiff's Position:

24 Olsen anticipates filing two motions for summary judgment: 1) directed to the  
25 illegality of CMS 1682-R; and 2) directed to the lack of neutral decision makers at the  
26 Department and Olsen's request for a special master.  
27  
28

Olsen anticipates filing this during the week on June 6, 2022.

2. Defendant's Position:

Defendant anticipates filing a motion for leave to take discovery to establish the date on which Plaintiff became aware that the April 2019 and March 2021 claims had been paid. Defendant proposes to file that motion by **July 1, 2022**.

The parties anticipate filing cross-motions for summary judgment. The parties propose the following briefing schedule:

Summary Judgment Filing	Deadline
Plaintiff's Motion	August 15, 2022
Defendant's Cross-Motion	September 5, 2022
Plaintiff's Reply	September 19, 2022
Defendant's Reply	October 3, 2022

The parties propose a hearing during the **week of October 24, 2022**, on their cross-motions for summary judgment. Oral argument is requested.

**O. Trial**

Because this is a record review case, trial is not necessary.

**P. Mediation**

1. Plaintiff's Position:

Plaintiff believes that mediation would not be fruitful as Plaintiff seeks decisions addressing the Secretary's conduct and barring a repetition.

2. Defendant's Position:

1 The parties engaged in settlement discussions in early January, shortly after the  
2 case was filed. No agreement was reached.

3 Defendant extended a Rule 68 offer of judgment in late January, offering an  
4 administrative remand and attorney's fees and costs to be awarded at market rates in  
5 an amount to be determined by the Court. That offer was not accepted. In mid-May,  
6 following the denial of Plaintiff's preliminary injunction motion, Defendant extended  
7 a second offer of judgment, again offering an administrative remand and attorney's  
8 fees and costs to be awarded at market rates in an amount to be determined by the  
9 Court. That offer was not accepted.

10 Defendant has filed a motion to refer the case to a U.S. Magistrate Judge or a  
11 U.S. Bankruptcy Judge for a settlement conference. ECF No. 44. Plaintiff has  
12 opposed the motion. The motion is noted for hearing on June 13, 2022.

13 **Q. Other Matters re: Just, Efficient and Economical Resolution of the Case**

14 **1. Plaintiff's Position**

15 Plaintiff believes that the Court should simply move to address the motions for  
16 summary judgment.

17 **2. Defendant's Position**

18 The April 2019 and March 2021 claims were paid on July 15, 2021. On  
19 information and belief, Plaintiff (or his counsel) confirmed payment of these claims  
20 *before the complaint was filed.*

21 Continued litigation would be a waste of the parties' and the Court's time.

1 Plaintiff's CGM claims were paid long ago. The challenged CMS Ruling has been  
2 rescinded (retroactively and prospectively). The Court has denied Plaintiff's bid for  
3 an injunction. Defendant has admitted that Plaintiff is entitled to an administrative  
4 remand and an award of attorney's fees and costs. The Court should now exercise its  
5 authority to bring this litigation to a speedy and efficient conclusion.  
6

7 DATED this 2nd day of June, 2022.  
8

9 Vanessa R. Waldref  
10 United States Attorney

11 *s/John T. Drake*

12 Brian M. Donovan

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17 *s/Roger M. Townsend*

18 Roger M. Townsend, WSBA No. 25525

19 *Attorneys for Plaintiff*

20 PARRISH LAW OFFICES

21 *s/James C. Pistorino*

22 James C. Pistorino

23 Admitted Pro Hac Vice

24 *Attorneys for Plaintiff*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2022, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

NAME & ADDRESS	Method of Delivery
Roger Townsend BRESKIN JOHNSON TOWNSEND 1000 Second Ave., Suite 3670 Seattle, WA 98104	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other: _____
James Pistorino PARRISH LAW OFFICES 788 Washington Road Pittsburgh, PA 15228	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other: _____

*s/John T. Drake*  
John T. Drake